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Petition for Certiorari. 304

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Supreme Court of the United States

PACIFIC COAST STEAMSHIP COMPANY (A Corporation),

Appellant, and Petitioner, in this Court.

v.

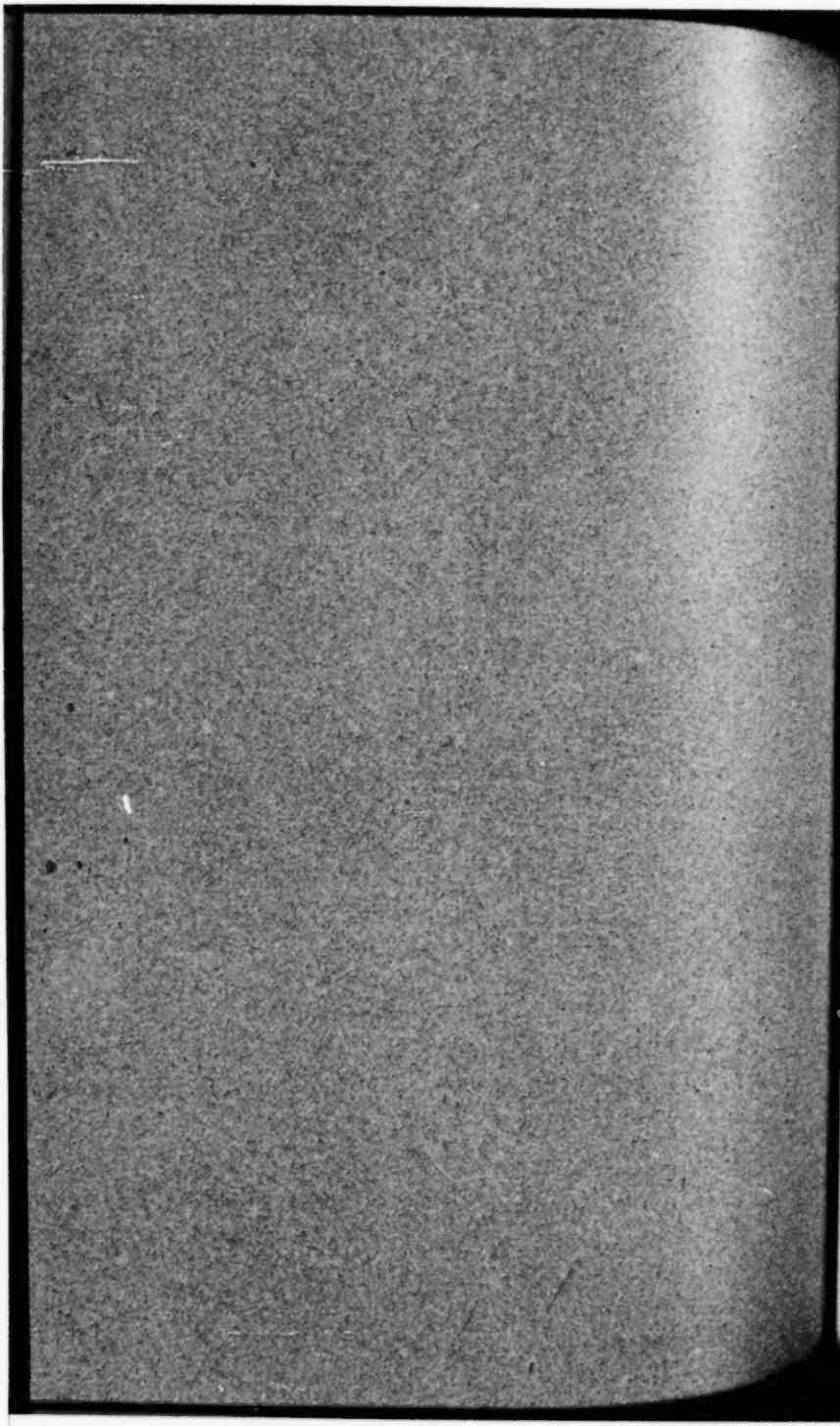
BANCROFT-WHITNEY COMPANY (A Corporation), A. HAAS, J. BARUCH and H. W. HELLMAN, Surviving Partners of the Firm of HELLMAN, HAAS & COMPANY,

Libellants and Appellees.

Petition of Pacific Coast Steamship Company, a Corporation, for a Writ of Certiorari to Review the Judgment of the Circuit Court of Appeals for the Ninth Circuit in the Above Entitled Proceeding.

GEO. W. TOWLE, JR.,

Counsel for Appellant and Petitioner.



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IN THE

Supreme Court of the United States

PACIFIC COAST STEAMSHIP COMPANY (A CORPORATION),
Appellant and Petitioner,
v.
BANCROFT-WHITNEY COMPANY (A CORPORATION), A. HAAS, J. BARUCH AND H. W. HELLMAN, SURVIVING PARTNERS OF THE FIRM OF HELLMAN, HAAS & COMPANY,
Appellees.

Petition of Pacific Coast Steamship Company, a Corporation, for a Writ of Certiorari to Review the Judgment of the Circuit Court of Appeals for the Ninth Circuit in the Above Entitled Proceeding.

To the Honorable the Supreme Court of the United States:

The Petition of Pacific Coast Steamship Company, a corporation, respectfully shows:

That at 2 o'clock in the afternoon of the 29th day of April, 1888, its steamship "Queen of the Pacific," otherwise and hereinafter called "Queen," sailed from the port of San Francisco, in the State of California, on a

voyage to San Diego and intermediate ports in said State, having on board a cargo of general merchandise, and upwards of 200 persons, certain of which merchandise was owned by and consigned to Hellman, Haas & Co., a co-partnership, consisting of A. Haas, J. Baruch, H. W. Hellman, and Jacob Haas (Transcript filed herewith, p. 91), and certain thereof was owned by Bancroft-Whitney Co., a corporation.

That a little more than twelve hours after the "Queen" sailed, that is, at 2.30 o'clock A. M., on April 30, 1888, it was found that water was entering from the sea into a water tight compartment in the between decks section of the vessel, known as the "starboard alleyway;" that compartment being about 100 feet long, by 10 feet wide, and 9 feet high; and then closed at each end by iron bulkheads having therein iron doors which were then closed and fastened with set screws; and at that time the compartment was stowed full of freight. The port side, or wall, of the compartment was the iron bulkhead of the engine room, and it was the discovery of water, intermittently flowing through an aperture in that wall about the size of a ten-penny nail and situate four or five inches above the floor of the "alleyway" and dropping thence onto the floor of the engine room, that first indicated to those on board that anything was wrong with the vessel. Diligent effort was at once made, by the master and crew, to ascertain the place at which the water was entering the vessel, and while it was found that the leak was located in the side of the ship within the area of the "starboard alleyway," its exact location could not be ascertained. Up to the time that the water was

discovered the steamer had had no appreciable list, but within half an hour thereafter she had gradually acquired a list of 6 or 7 degrees to the starboard, and that fact and the constant and rapid increase of the list thereafter, indicated to the master that such an aperture had been caused in the side of the ship that it would not be prudent to open the alleyway doors, and that the safety of all concerned required that the steamer should be stranded upon the beach, which was thereafter done at Port Harford, in said State, the "Queen" then having a list of about thirty (30) degrees to starboard. Upon the vessel being so stranded she nearly filled with water and lay in an entirely helpless condition for three or four days. During that time the services of a diver were procured from San Francisco, and he, after repeated efforts, found the aperture and stopped it, whereupon the water was pumped out of the vessel and she floated and was towed back to San Francisco. On arrival at San Francisco her cargo was all discharged upon the wharf and delivery thereof there tendered to and accepted by the several owners, they first giving their several general average bonds.

The merchandise, delivery of which was so accepted by Hellman, Haas & Co., with which we are here especially concerned, was by them delivered to Newhall Sons & Co., auctioneers, for sale at public auction, and was so sold, for account of Hellman, Haas & Co., on or about the 19th day of May, 1888, and the net proceeds of the sale were paid to that firm, by Newhall Sons & Co., on or about May 28, 1888. The merchandise shipped to domestic coast ports would, ordinarily, be

delivered to the consignee, at destination, within five days from the date that it was received from the shipper.

No claim for damage to such merchandise, or to any thereof, was made upon the owners of the "Queen" prior to the sale, nor were the owners of the "Queen" notified of the intended sale. The merchandise so sold—represented by libelants as consisting of rice, nails, tea, drugs, chowchow, pickles, canned vegetables, oil in bottles, sugar in barrels and half barrels, and currants in barrels, 1,551 packages in all—was, so far as appears, all sold as one lot, without examination of the contents of the packages, or any thereof, being made by any one, or an opportunity for such an examination given to the persons attending the sale. The terms of sale were cash upon delivery, and such delivery to be made before dark of the day of sale. The lump sum for which the goods were so sold was $1,262.20, and the net sum paid to Hellman, Haas & Co. was $1,190.09.

The steamer, after discharging her cargo as aforesaid, was repaired at San Francisco, and thereafter was continuously employed between domestic coast ports, or was lying in San Francisco Bay until she was, under alias process issued in this proceeding on May 4, 1892, seized at said San Francisco on said day; but no claim was made upon her owner, or libel filed against the steamer, for damages in the premises, until the 28th day of April, 1892, four years, lacking two days, from the date that the steamer was stranded at Port Harford, and more than three years and eleven months after the date that the merchandise was so sold for account of Hellman, Haas & Co.

When the libels were filed, or thereafter until the 4th

day of May, 1892, the "Queen" was not within the northern district of California (Transcript, pp. 24–25, and 33).

Each of the libels, after stating that it was "in a cause of contract civil and maritime," and alleging the delivery of the goods to the Pacific Coast Steamship Company for shipment to destination upon the "Queen," and that the same were shipped under a contract of affreightment, in writing, wherein the steamship company "acknowledged to have received said goods *in apparent good order*," and promised to deliver the same, at destination, "in like good order as when received, *certain perils in said agreement mentioned excepted*," and that a copy of said agreement is annexed to the libel "*and made a part hereof*," and that said "Queen" sailed with the goods on board thereof, alleges that "notwithstanding said contract of affreightment * * * said merchandise was not delivered" at destination "or at any other place in like good order as when received, but on the contrary was returned to said port of San Francisco in a greatly damaged condition, *by reason of having been wet with sea water* during said voyage, *which by reason of the negligence* of said steamship company, its officers and servants, *gained access to the interior of said ship where said merchandise was stowed*, to wit, on or about the 30th day of April, A. D. 1888. * * * That in consequence of the injury and damage to said merchandise *by sea water* as in the last preceding article herein is mentioned and set forth the *libelants have sustained damages* in the sum of," in the case of Hellman, Haas & Co., $9,015.24, and in the case of the Ban-

croft-Whitney Co., $455.00. And further alleged "that said steamship is now within the northern district of California," and the premises within the admiralty and maritime jurisdiction of the Court, to wit, the District Court of the United States for the northern district of California, in which said libels were filed. (See pp. 9 to 19 of Transcript.)

The bill of lading for the goods of Hellman, Haas & Co.—made a part of the libel with which we are here principally concerned—contained, among other stipulations, the following:

"Shipped * * * per the Pacific Coast Steamship Company's line of steamers, to be forwarded on the steamer 'Queen' * * * the following property, *in apparent* good order, except as noted, *value, weight, contents and condition of contents being unknown to said company* * * * to be delivered at the vessel's tackle, in like apparent good order and condition, at the port of San Pedro, unto Hellman, Haas & Co., or assigns, * * * subject to the following conditions, which are made a part of this bill of lading: * * * The company shall not be held responsible or accountable for * * * damage arising from * * * accidents to or from machinery, boilers or steam, *or any other accidents or dangers of the seas, rivers, roadsteads or harbors, or of sail or steam navigation, of what nature or kind soever.* The company shall not be liable, or accountable, for the hidden contents of packages, *for weight, leakage, breakage,* shrinkage, *rust,* loss or damage resulting from insecurity of packages * * *. It is agreed that in the settlement of any claim for loss of or damage to any of

the above mentioned goods, *said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment.* It is expressly agreed that all claims againt the P. C. S. S. Co., or any of the stockholders of said company, for damage to or loss of any of the within merchandise, must be presented to the company within thirty days from date hereof; and that after thirty days from date hereof, no action, suit or proceeding, in any Court of justice, shall be brought against said P. C. S. S. Co., or any of the stockholders thereof, for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss."

And said bill of lading had, indorsed thereon, a specification of the packages of merchandise represented by it, and, in addition thereto, the words "*owner's risk.*" (See Bill of Lading, page 20.)

The other contracts of affreightment were, save as to the words "owner's risk," substantially the same, in their stipulations, as the said bill of lading. (See page 22 of Transcript.)

When the libels were filed, to wit, on the 28th day of April, 1892, a monition was issued thereon and placed in the hands of the marshal for service, by attachment of the "Queen" (Tr., pages 23–4), and the same was on May 3, 1892, returned not served by reason of not finding the "Queen" within the district. (Tr., pp. 24–25.)

On May 4, 1892, an alias monition was issued (Tr.,

pages 25–6), and the "Queen" seized thereunder on that day (Tr., p. 27).

Thereafter, and on the 16th day of May, 1892, your petitioner, as claimant of the "Queen," filed exceptions to said libels (see pages 28–30 of Transcript) upon substantially the following grounds:

First. That the libels show that the libelants have no cause of action against and no lien upon the "Queen."

Second. That the libels show that the causes of action therein stated, if any, were waived and abandoned by virtue of the special provisions of the several contracts pleaded by libelants, to wit, the thirty (30) day clause thereof, long prior to the date said libels were filed.

Third. That said libels show that the demands asserted thereby are stale, neglected and legally abandoned; and are barred by the statutes of limitations of the State of California relating thereto, to wit, Section 337 of the Code of Civil Procedure, which provides a limitation of four (4) years within which to commence an action based upon a breach of an express stipulation of a contract in writing, executed in this State; Subdivision 3 of Section 338 of the same Code, which provides that actions for injuries to personal property must be commenced within three (3) years from the date of the injury; Section 2174, Civil Code, which provides that the obligations of a common carrier may be limited by special contract; Section 2909, Civil Code, which provides that a lien is to be deemed accessory to the act for the performance of which it is a security, and is extinguished in like manner with any other accessory obligation; and Section 2911, Civil Code, which provides that a lien is extinguished by

the lapse of time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation.*

Further, that the Court had not jurisdiction in the matters alleged because said steamship "Queen" was not within the territorial jurisdiction of the Court when the libels were filed.

Further, that the lien upon said "Queen," in the premises, had expired before the "Queen" was brought within the jurisdiction of the Court; and this by reason of the fact that the causes of action stated in the libels accrued, if at all, on April 30, 1888, and the vessel was not seized by the marshal until May 4, 1892, more than four years after the date of the matters complained of.

Upon hearing had the exceptions were each and all overruled; the Court then finding as a fact that the "Queen" was *not* within the district when the libels were filed. (See page 33 of Transcript.)

Thereupon the Pacific Coast Steamship Company filed its answers to said libels, by which it admitted the shipments to have been made under the special contracts relating thereto pleaded by libelants; denied that there had been the negligence alleged in the libels, or any negligence in the premises; admitted that the merchandise was not delivered at the destination stated in said contracts; alleged the misfortune to the "Queen" as hereinabove stated; that the "Queen" was stranded at Port Harford; that such stranding was necessary and

*For a transcript of all the statutes, in this petition referred to, see appendix hereto.

was done by the master of the "Queen" as a measure of prudence and in the interest of all concerned in the safety of the ship and the cargo and the persons on board of her, and that the merchandise was wet as the result of such stranding; that the merchandise was all returned to San Francisco on the "Queen," and there delivered to and accepted by the owners thereof; and denied that libelants had suffered damage in the premises to the extent of the sums stated by them, or to any extent, or at all. Alleged that the "Queen" was in all respects seaworthy when she sailed on said voyage; that she was properly provisioned and supplied and was furnished with a competent master and crew. Further alleged, as a defense, the thirty-day clause of the bill of lading, pleaded by libelants and heretofore set forth; and that no claim had been presented, or suit brought, within such thirty days, or at any time prior to filing the libels herein; that libelants knew of the stranding of the "Queen," and that their merchandise had been wet with sea water as the result thereof, on or prior to the 1st day of May, 1888; that the demands asserted in the libels were barred by Section 337 of the Code of Civil Procedure of the State of California, and by Subdivision 3 of Section 338 of said Code, and by Section 813 of said Code—which latter section provides a limitation of one year for liens upon vessels engaged in carrying goods from one port to another in said State—and by the laches of libelants, in prosecuting the same.

Thereafter the cases above referred to—the same being two only out of more than thirty libels filed against the "Queen" on August 28, 1892, and on subsequent

dates—came on for hearing before the Court, and it was then admitted that if the "Queen" was liable to Bancroft-Whitney Co. at all she was so liable in the sum of two hundred dollars, and no more. There was no admission relating to the claim of Hellman, Haas & Co.

Counsel for Hellman, Haas & Co., or, more accurately, for The Magdeburg General Insurance Company suing in the names of three of the surviving partners of that firm (see pages 15 and 19 of Transcript) to maintain its libel, called a witness who testified that Hellman, Haas & Co. knew of the stranding of the "Queen" as early as May 1, 1888, and that subsequent to that date the witness, a member of that firm, had instructed a clerk in its employ to prepare, from copies of invoices in the possession of that firm, a statement of the *cost* of the goods on board the "Queen." That the witness knew that the statement so prepared was correct, and was for exhibition to an insurance company with which that firm then had an "open policy;" and that the *cost* of the goods to Hellman, Haas & Co., as shown by such statement, was the sum of $10,205.13; that Hellman, Haas & Co. had accepted delivery of the goods, from the "Queen," at San Francisco; and by, another witness, proved that the packages were wet when delivered from the "Queen," and that the nine lots of goods, 1,551 packages in all, were sold at public auction at San Francisco, for account of Hellman, Haas & Co., on the 19th day of May, 1888, for the lump sum of $1,262.20, and that the net sum realized by Hellman, Haas & Co. was $1,190.09; and that such auction sale was advertised for two days in one newspaper. That no examination of the

contents of the packages was made, and that the terms of sale were cash on delivery, and delivery to be made before dark of the day of sale.

The foregoing was all the evidence introduced by libelants to show the contents of the packages, and the condition of the contents thereof when delivered to the "Queen," and to show the alleged negligence and the extent of the damage to the goods; and on that they rested their case.

Claimant, your petitioner, thereupon moved for a judgment in its favor, which was denied.

Thereupon claimant introduced evidence from which the Honorable Judge of the District Court found that the "Queen" was entirely seaworthy when she sailed on the voyage in question, and was properly officered, manned and equipped (Tr., p. 268, 280); that there was no evidence indicating negligence of officers or crew in navigating the vessel (Tr., p. 281); that water had not been flowing very long into the compartment when the leak was discovered (Tr., pp. 283–4); that the testimony rebuts any presumption that a dead light in that compartment could have been opened by any one on the voyage (Tr., p. 284), and that the evidence all tends to show that a dead light in that compartment could not have been open when the "Queen" sailed upon that voyage (Tr., pp. 281–284), and that the water entered the "Queen" through a dead light. The Court further found that the Magdeburg General Insurance Company was the real libelant, and thereupon ordered judgment in favor of libelants, with a reference to a master to ascertain and report the damages sustained (Tr., p. 294).

Thereupon the evidence on behalf of libelants, above referred to, was all re-introduced before the master, and libelants there admitted that no claim for damages to any of the merchandise had ever been made by them until the said libels were filed (Tr., pp. 299–301).

Thereupon the master reported that the *market value* of the said merchandise of Hellman, Hass & Co., at the time of shipment, was the sum of $10,205.13, and that its market value in its damaged condition, when received by libelants at San Francisco, was $1,190.09, the net sum realized from the sale, and that the damage sustained by Hellman, Haas & Co. in the premises was the difference between the two sums, to wit: between the *cost* price and the *sale* price, that is, the sum of $9,015.04 (Tr., pp. 302–303).

To that report claimant filed exceptions upon the grounds, among others, that there was no evidence produced before the master which showed, or tended to show, the *cash value* or the *market value* of the merchandise *at the port of shipment at the date of shipment*, or which would support the finding of the master as to its market value on the day it was shipped; and that no evidence had been introduced before the master which supported his finding that the market value of the merchandise in its damaged condition was the value thereof reported by him, and that there was no evidence to support his finding that libelants had suffered damages in the sum of $9,015.04, or in any other substantial amount (Tr., pp. 304–307).

The exceptions were overruled, and a decree, as recom-

mended by the master, thereupon entered upon his report (Tr., pp. 309–12).

From that decree an appeal was taken to the Circuit Court of Appeals for the Ninth Circuit, and the same was there heard upon the record as made, and upon the evidence introduced in the District Court and before the master, and upon such hearing the decree of the District Court was affirmed.

Thereupon, and at the same term in which its judgment was rendered, a stay of proceedings was duly obtained from the Court of Appeals to enable your petitioner to present this its petition to this Honorable Court.

Petitioner's Contentions.

The contention of your petitioner has at all times been and now is:

First. That neither the District Court, nor the Court of Appeals, had jurisdiction to proceed to a decree against your petitioner upon said libels, it appearing that the "Queen" was not within the northern district of California when the libels were filed.

Second. That the claims against and the liens upon the "Queen," resulting in favor of libelants from the shipment of their goods on board of her, expired, terminated and ended long prior to the date that the "Queen" was seized by the marshal under process issued upon said libels, that is to say:

(*a*) In thirty days from the date of shipment, by virtue of the thirty-day stipulation of the bill of lading; or,

(*b*) In one year from the 30th day of April, 1888, by

virtue of the provisions of Section 815 of the Code of Civil Procedure of the State of California ; or,

(*c*) In three years from the 30th day of April, 1888, by virtue of the provisions of Subdivision 3 of Section 338 of said Code of Civil Procedure ; or

(*d*) At the very latest within four years from the 30th day of April, 1888, by virtue of the provisions of Section 337 of said Code of Civil Procedure ; and by virtue of the provisions of said Section 2174, 2909 and 2911 of the Civil Code of said State.

Third. That the contract of the "Queen," evidenced by the bill of lading pleaded by libelants, was single and indivisible, that is, to deliver the goods shipped by Hellman, Haas & Co. at the port of San Pedro ; and that libelants waived their right to a performance of that contract when they voluntarily accepted delivery of the goods at San Francisco. And that thereafter their cause of action, if any, was such as arose from the breach of an obligation imposed by the law, independently of contract, and therefore not within the intent of Section 337 of the Code of Civil Procedure.

Fourth. That the cause of action stated in the libels, to wit, that said merchandise was damaged "by reason of having been wet with sea water during said voyage, which by reason of the negligence of said steamship company, its officers and servants, gained access to the interior of said ship where said merchandise was stowed," is not a cause of action upon contract, but is a cause of action upon an obligation imposed by the law, independently of contract, and therefore founded in tort ; and that such being the fact the cause of action was *prima*

facie barred by the provisions of Subdivision 3 of Section 338 of the Code of Civil Procedure, which fixes a limitation of three years within which to commence such an action.

Fifth. That proof of the *cost* of the goods was not proof of the *cash value* of the goods at the port of shipment at the date of shipment; and that as the bill of lading, pleaded by libelants, expressly provides that their claims for damage shall be *restricted* to the *cash value* of the goods at the port of shipment at the date of shipment, there was no proof of the *basis* upon which they had stipulated that their damages should be assessed.

Sixth. That the proof that nine different kinds of goods, consisting of 1,551 packages—the contents thereof ranging in character, as represented by libelants, from drugs and tea to nails—were, without examination being made as to the contents, or as to the condition of the contents, of a single package, sold at auction, on the wharf, as one lot and for a lump sum, does not support a finding that the sum realized at such sale was the then market value of the goods so sold.

Seventh. That the bill of lading containing the reservation on behalf of the "Queen" that the goods were in "*apparent good order*," and that the "*contents and condition of contents were unknown to the steamship company*," it was incumbent upon libelants to prove, before they could recover in damages, that the packages contained the specified merchandise, and that the same was in good order when delivered to the "Queen."

Eighth. That the stranding of the "Queen" at Port

Harford was a peril of the sea, and was the proximate cause of the goods being wet with salt water, and that the "Queen" was, *prima facie*, and until negligence upon the voyage was shown, released from liability, for damage so caused, by the express stipulations of the bill of lading.

Ninth. That the carrier's whole duty to the shipper is performed when it furnishes a seaworthy vessel, properly officered, manned and equipped, and is guilty of no negligence in handling or stowing the goods, or in navigating the vessel on the voyage.

Tenth. That the thirty-day clause of the bill of lading pleaded by libelants inured to the benefit of the "Queen" in this proceeding; and that as libelants alleged that the bill of lading was their contract and that the goods were shipped under it, they were estopped from claiming, and the Court was estopped from holding, that any stipulation thereof was not reasonable, or not binding upon libellants.

And your petitioner believes that each of its said contentions is well founded in the law.

The Circuit Court of Appeals has held to the contrary of your petitioner's contentions in each of the foregoing particulars, while the reported decisions of other United States Courts in other Circuits, and the weight of authority, as your petitioner believes, sustain each of the said contentions of your petitioner, that is to say:

1. In the Eighth Circuit, in the L. B. X., 88 Fed R., 290, it was held that a libel filed against a vessel that was not, at the time, within the district, did not confer jurisdiction, and should be dismissed upon motion.

2. That State statutes have force to add to and to modify the law, as administered in the United States Courts of Admiralty, has been held in the Sixth Circuit in the case of The Guiding Star, 18 Fed. R., 263; in the Second Circuit, in the case of The J. W. Tucker, 20 Fed. R., 129; in the Eighth Circuit, in the case of The Wyoming, 35 Fed. R., 548, and in The Menominie, 36 Fed. R., 197; in the Third Circuit, in The Venture, 36 Fed. R., 285; in the Fourth Circuit, in Clyde *v.* Transportation Co., 36 Fed. R., 501; in the Fifth Circuit, in The Madrid, 40 Fed. R., 677; and by the Circuit Court of Appeals for the Sixth Circuit in The Samuel Marshal, 54 Fed. R., 396, while the Court of Appeals has held against the contention of your petitioner, that the statute of the State of California—Section 813, Code of Civil Procedure—is without force to limit the duration of libelants' lien upon the "Queen."

3. United States Courts in other Circuits have held that an action to recover for damages alleged to have been caused by negligence is founded in tort, and not upon contract, to wit: in the Sixth Circuit, in W. Manfg. Co. *v.* M. & O. R. Packet Co., 21 Fed. R., 896, and in The Liberty No. 4, 7 Fed. R., 226; in the Third Circuit, in The M. Vandercook, 24 Fed. R., 472; and in the Second Circuit, in The Brantford City, 29 Fed. R., 375, and in The Kensington, 88 Fed. R., 331; *and such is the expressed opinion of this Court* in Railroad Co. *v.* Laird, 164 U. S., 393, and, more emphatically, in The John G. Stevens, 170 U. S., 113; while in this case the Court of Appeals has held against the contention of your petitioner, that this action, so based, is based upon contract.

4. The District Court (Tr., p. 261) and the Circuit Court of Appeals have held against the contention of your petitioner that the question of laches should be, *prima facie*, determined by the provisions of Section 337 of the Code of Civil Procedure of the State of California, the four year statute; whereas the Supreme Court of the State of California in Chipman *v.* Morrill, 20 Cal., 131, Thomas *v.* Pacific Beach Co., 115 Cal., 136, and McCarty *v.* Mt. Tecarte L. & W. Co., 111 Cal., 328, has decided that that section applies only when the action is founded upon the breach of an express stipulation of a written contract; and your petitioner believes that such construction, by the State Court, is a part of that section, and should have been so regarded by the Court of Appeals.

5. The District Court and the Circuit Court of Appeals have held, against the contention of your petitioner, that proof of the *cost* of the goods—the time or terms of purchase, or elements of cost, of the same not being shown—is proof of the *cash value*, or *market value*, of the goods *at the port of shipment at the date of shipment*, while United States Courts in the First Circuit, in Tappan *v.* U. S., 2 Mason, 393, U. S. *v.* 16 Pkgs. of Goods, 2 Mason, 48, Alfonso *v.* U. S., 2 Story, 421; in the Second Circuit, in Froloff *v.* N. Y. C. & H. R. R. Co., 10 Blatch., 16; and by the Circuit Court of Appeals in the First Circuit in The H. F. Dimmock, 23 C. C. A., 123; and by this Court, in U. S. *v.* Tappan, 11 Wheat., 419, have, as your petitioner believes, held to the contrary.

6. The District Court and the Circuit Court of Appeals have held, against the contention of your peti-

tioner, that proof that nine different kinds of goods—consisting of 1,551 packages in all—realized when sold at auction as one lot, without opportunity given for examination, and for a lump sum, $1,262.20, is proof that the sum so realized, less the expenses of the sale, was the market value of the goods so sold; while United State Courts in the Second Circuit, in The Marinin S., 28 Fed R., 664, and Wolff *v.* The Vaderland, 18 Fed. R., 733, have held that such a sale does not show the market value of the goods sold.

7. The Court of Appeals has held that libelants were entitled to recover for damages to certain merchandise without proof that such merchandise was in the packages shipped, and without proof that the same was in good order when delivered to the "Queen;" whereas other United States Courts have held, as your petitioner believes, that the burden was upon libelants to show, before they could recover in damages, that the merchandise described in their bill of lading was, in fact, delivered to the "Queen," and that the same was in good order when so delivered; to wit, it was so held in the Second Circuit in Schultz *v.* The Pietro G., 40 Fed. R., 497; and in the First Circuit in Vernard *v.* Hudson, 3 Sumn., 405; and by this Court in Clark *v.* Barnwall, 12 How., 272.

8. The District Court and the Circuit Court of Appeals have held, against the contention of your petitioner, that the voluntary stranding of the "Queen" at Port Harford, whereby the libelants' goods became wet (see statement by proctor for libelants, Tr., page 89), was not, *prima facie*, a peril of the sea, or the proximate cause of the damage to the goods, within the intent of

the clause of the bill of lading relating thereto; while in the Second Circuit, in Bales of Cotton, 8 Blatch., 221; Rathbone *v.* Fowler, 6 Blatch., 294; Fitzpatrick *v.* Bales of Cotton, 3 Ben., 42; and in the First Circuit, in Potter *v.* Ins. Co., 2 Sumn., 197; and by this Court in The Propeller Niagara, 21 Howard, 7, it is, as your petitioner believes, held that stranding is *prima facie* a peril of the sea.

9. The District Court and the Circuit Court of Appeals have held, against the contention of your petitioner, that the "Queen" is liable in damages when it plainly appears, and is found as a fact, that she was a seaworthy ship, and was properly officered, manned and equipped, and that there was no negligence on the voyage.

10. The District Court and the Circuit Court of Appeals have held, against the contention of your petitioner, that the "Queen" is liable in damages for a failure to deliver the goods at destination; and this when the libels do not allege that damages were sustained by reason of the failure to so deliver, and when it affirmatively appears, and is found as a fact, that libelants had accepted delivery of the goods elsewhere.

Your petitioner believes that the Court of Appeals erred in holding against the contention of your petitioner in each of the aforementioned particulars, and that its decision is contrary to the weight of authority in the other Circuits; and is contrary to the decisions of this Court in the particulars aforesaid in so far as the questions involved have been, in other cases, considered and decided by this Court.

The cause is important in several respects:

It involves, among others, the question of whether (*a*) a libel filed against the "Queen" when she was not within the district gave to the District Court jurisdiction to proceed thereon when the vessel afterwards came within the district? And, if that question be answered in the affirmative, (*b*) whether such jurisdiction dates from the day the "Queen" came within the district, or from the day the libel was filed? And (*c*) whether filing a libel against the "Queen" preserved libelants' lien thereon until she was seized, it appearing that the process upon which the steamer was seized was not issued, nor the "Queen" seized, until after the time that the lien would, in any view of the law, have expired had no libel been filed? And (*d*) whether a statute of the State of California fixing a limitation for liens upon vessels engaged in trade between ports in that State shall be given force in the Admiralty to limit the duration of such lien.

Such questions, your petitioner believes, have not heretofore been directly decided by this Court. They are important to your petitioner because if any one of them shall be decided according to its contention, such decision will relieve it not only of the burden of the decree in this case, but also from the large amount of claims asserted in upwards of thirty other libels filed against the "Queen."

And the same result to your petitioner would follow upon the determination that the cause of action alleged in the libel was not based upon the breach of an express stipulation of the bill of lading, but was based upon

negligence, to wit, an alleged violation of an obligation imposed by the law.

The contentions of your petitioner, above stated, relating to proof of *cash value* of the goods at the port of shipment and the date of shipment, and to the manner in which proof of the extent of the damage thereto may be shown, are important not only to your petitioner, but to all persons engaged in commerce; and the decision by this Court thereon will be of great importance as a guide to all shippers and carriers.

Your petitioner herewith presents to this Court and files a duly certified transcript of the entire record of the District Court in the case, as the same appears in the said Circuit Court of Appeals, including the several opinions, together with a brief which discusses the questions at issue.

Your petitioner prays that the writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals of the United States for the Ninth Circuit, commanding the said Court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and of all the proceedings of the said Circuit Court of Appeals in the case of the "Pacific Coast Steamship Company, a corporation, Appellant, *v.* Bancroft-Whitney Company, a corporation, A. Haas, J. Baruch and H. W. Hellman, surviving partners of the firm of Hellman, Haas & Company, Appellees," No. 454 on the records of said Court, to the end that the said case may be reviewed and determined by this Court as provided by Section 6 of the Act of Congress entitled "An Act to

establish Circuit Courts of Appeal, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes, approved March 3, 1891."

And your petitioner further prays that the said judgment and decree of said Circuit Court of Appeals be reversed, and the cause remanded with instructions to enter a judgment and decree in favor of your petitioner and against The Bancroft-Whitney Company, a corporation, A. Haas, J. Baruch and H. W. Hellman, surviving partners of the firm of Hellman, Haas & Company, dismissing said libels, with costs.

And your petitioner will ever pray, etc.

PACIFIC COAST STEAMSHIP COMPANY,
Petitioner.

By JOHN L. HOWARD,
Vice-President.

GEO. W. TOWLE, JR.,
508 California Street, San Francisco, California,
Counsel for Petitioner.

UNITED STATES OF AMERICA,
Northern District of California. } ss.

George W. Towle, Jr., being duly sworn, deposes and says: I am counsel for the petitioner above named, and as such have had personal charge of the case in the

United States Circuit Court of Appeals for the Ninth Circuit, and in the District Court of the United States in and for the Northern District of California. I know the contents of the foregoing petition. The facts therein stated are true to the best of my knowledge, information and belief, and this proceeding is not prosecuted for the purpose of delay.

Subscribed and sworn to before me this 29th day of August, 1899.

GEO. W. TOWLE, JR.

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals, Ninth Circuit.
[SEAL.]

Certificate of Counsel.

I hereby certify that I have carefully examined the foregoing petition and application for a writ of certiorari, and that in my opinion the same is well founded, and the case is one in which the prayer of the petitioner should be granted by this Court.

GEO. W. TOWLE, JR.,
Counsel for Petitioner.

To The Bancroft-Whitney Company, a corporation, and A. Haas, J. Baruch and H. W. Hellman, surviving partners of the firm of Hellman, Haas & Company, Respondents and Appellees, and Milton Andros, Esq., their Proctor:

Please take notice that on the 9th day of October, 1899, on the opening of Court, or as soon thereafter as the matter can be heard, I shall move the Supreme Court of the United States, at the Court-room thereof in the city of Washington, D. C., that the foregoing petition for a writ of certiorari be granted.

Dated at San Francisco, California, this 29th day of August, 1899.

GEO. W. TOWLE, JR.,

Counsel for Petitioner.

Service of above and receipt of copy thereof, together with copy of the brief, is hereby admitted at San Francisco, this 29th day of August, 1899.

MILTON ANDROS,

Proctor for Appellees.

APPENDIX.

Sec. 335, C. C. P.: The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows: * * *

Sec. 337, C. C. P.: Within four years:

An action upon any contract, obligation or liability, founded upon an instrument in writing executed in this State.

Sec. 338, C. C. P.: Within three years: * * *

3. An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property.

Sec. 813, C. C. P.: All steamers, vessels and boats are liable: * * *

5. For non-performance, or malperformance, of any contract for the transportation of persons or property between places within the State, made by their respective owners, masters, agents or consignees;

6. For injuries committed by them to persons or property, in this State.

Demands for these several causes constitute liens upon all steamers, vessels and boats, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in

force for the period of one year from the time the cause of action accrued.

Sec. 2174, C. C.: The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract.

Sec. 2909, C. C.: A lien is to be deemed accessory to the act for the performance of which it is a security, whether any person is bound for such performance or not, and is extinguishable in like manner with any other accessory obligation.

Sec. 2911, C. C.: A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation.